

November 22, 1999

FAR Secretariat
General Services Administration
1800 F Street, NW Room 4035
Attn: Laurie Duarte
Washington, DC 20405
RE: FAR Case 98-609

Dear FAR Secretariat:

The Chief Counsel for Advocacy of the U.S. Small Business Administration was created in 1976 to represent the views and interest of small business in federal policy making activities¹ The Chief Counsel participates in rulemakings and other federal agency activities when he deems it necessary to ensure proper representation of small business interests. In addition, the Chief Counsel has a particular interest in ensuring that laws and regulations do not have an adverse impact on competition among businesses of differing sizes. Finally, the Chief Counsel monitors agencies' compliance with the Regulatory Flexibility Act (RFA)² and works with federal agencies to ensure that their rulemakings are supported by analyses, available for public comment, of the impact that their decisions will have on small businesses.

This letter is in response to FAR case 98-609; Federal Acquisition Regulation; Federal Supply Schedules Small Business Opportunities. The proposed regulation would enhance the participation of small business in the Federal Supply Schedule Program by: (1) encouraging ordering offices to consider small business when conducting evaluations before placing an order, (2) including in the agency procurement base and goals, the dollar value of orders expected to be placed against the General Services Administration's (GSA) Federal Supply Service Schedules and reports on the awards to small business to measure compliance with these goals; and (3) reaffirming that the GSA and other agencies that have been delegated the authority to establish a Federal Supply Schedule must comply with all statutory and regulatory requirements before a solicitation is issued.

Federal small business prime contract dollars have been on a decline since 1996. In 1996 small business share of all federal prime contract dollars was approximately 21 per cent; in 1998 it had dropped to 20.6 percent. Overall, it is estimated that the DOD small business dollar award will decrease by nearly 6 billion dollars between 1996 and 1999. In fact, current projections for fiscal 1999 would indicate a continuing decline on the overall Federal procurement dollar awards to small business.

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations council are to be commended for recognizing the urgent need to stem the tide of a declining small business prime contract base. However, FAR case 98-609 is not sufficient in breadth and depth to curtail the eroding small business procurement base. First, the Initial Regulatory Flexibility Analysis (IRFA) is deficient in detailing the impact on small business. Second, the proposed regulation does not provide the contracting agencies or ordering offices with proactive tools necessary to implement the objective of the regulation. Each will be discussed separately.

First, the IRFA is deficient in that it does not provide sufficient data for the small business community to evaluate the potential impact of the proposed regulation. As an example, the IRFA states that out of nearly "7000 national scope schedule contracts, 4900 are in effect with small business, Thus approximately 70 per cent of the schedule contractors are small business contractors received approximately \$2.5 billion, or 33 per cent of total schedule sales. If this data is sliced differently, it would indicate that, while small business comprise more than two-thirds of the schedule contractors, they are awarded a mere one third of the contract dollars. Thus, small businesses are able to compete and win schedules but they are not as fortunate as large businesses in being awarded the actual contract. Large businesses are the real beneficiary of the Federal Supply Schedule Program. This IRFA does not provide an explanation for the vast

¹ Pub.L. No. 94-305 (codified as amended at 15 U.S.C. §§634a-g, 637.)

² Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§601-612.)

discrepancy between small and large business awards. There must be something inherently wrong in the Federal Supply Schedule Program contract award process when one-third of the businesses are awarded two-thirds of the contract dollars. The proposed regulation is structurally flawed for not discussing this problem and for not providing a proactive solution to fix the defect.

Second, the response provided to question six of the IRFA is adequate. Question six seeks a description of any significant alternatives to the proposed rule that accomplish the stated objectives of *applicable statutes* and that minimize any significant economic impact of the proposed rule on small business. The response stated is “there are no practical alternatives that will accomplish the objectives of this rule. The rule attempts to encourage ordering offices to consider the availability of small business concerns under the schedule and to encourage the consideration of such firms when conducting evaluations before placing an order.”

By way of background, the Small Business Act was first enacted 1953. It calls for, among other things, the maximum utilization of small business in federal procurement. As such, it is an “applicable statute” and, therefore, the contracting community is legally bound to “provide maximum contracting opportunities to small businesses.” It is clear that the Federal Supply Schedule Program as presently designed is not meeting the “stated objectives of applicable statutes.” The evidence for this conclusion is clear and convincing. One-third of all the contractors are large businesses and they are awarded two-thirds contracting dollars. On the other hand, small businesses represent two-thirds of all eligible contractors but they receive only one-third of these contract dollar awards.

Beyond a shadow of a doubt, the Federal supply Schedule Program is not being managed as intended, namely to ensure that contracts are awarded to the small business community. If FAR case 98-609 is designed to “enhance the participation of small business concerns under the Federal Supply Schedules Program” then the proposed regulation fails to meet its objective because it does not discuss the existing disparity and does not provide any type of guidance to the contracting agencies as to the methods and procedures for enhancing the participation of small business concerns under the Federal Supply Schedule Program. To correct some of the shortcomings of the Federal Supply Schedule Program, this proposed regulation could have proposed alternatives to reduce the subjective and discretionary authority of the contracting officer when selecting a business off the schedule. One alternative that should have been considered was imposing a dollar cap on the amount of awards to non-small businesses. Another alternative could be a special schedule restricted to small business. The FAR Council would be well advised to institute a public forum for small businesses to ascertain their input on how best to address these issues. However, the purpose of this response is not to discuss alternatives but to request that an IRFA be done that more adequately reflects the true impact of FAR case 98-609 on small business and that the regulation be re-proposed.

If you have further questions regarding the above please do not hesitate to contact me or Major Clark, Assistant Chief Counsel for Procurement Policy, of this office. He may be reached at 202-205-7150.

Sincerely,

Jere W. Glover

Jere W. Glover
Chief Counsel for Advocacy